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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7
8 DANIEL JANKANISH and
9 HEATHER JANKANISH, a married
10 couple, and DAVID L. MCFERRIN, on
11 behalf of themselves and all others
12 similarly situated,

13 Plaintiffs,

14 v.

15 FIRST AMERICAN TITLE
16 INSURANCE COMPANY and FIRST
17 AMERICAN SMS, aka SMS
18 SETTLEMENT SERVICES,

19 Defendants.

Case No. C08-1147MJP

ORDER ON MOTION FOR LEAVE TO
AMEND COMPLAINT

20 This matter comes before the Court on Plaintiffs' motion for leave to amend the
21 complaint. (Dkt. No. 95.) The Court has reviewed the motion, Defendants' response (Dkt.
22 No. 97), Plaintiffs' reply (Dkt. No. 100), and all other pertinent documents in the record. For
23 the reasons set forth below, the Court DENIES Plaintiffs' motion.

24 **Background**

25 Plaintiffs Daniel and Heather Jankanish and proposed named plaintiff Anne Alberg
sold or refinanced residential real estate in 2007 and 2008, and Defendant First American
Title Insurance Company ("FATIC") served as the escrow agent for each transaction. (Dkt.
No. 95, Ex. A ¶¶ 11-12.) At issue in this motion are Plaintiffs' claims under the Real Estate
Settlement Procedures Act ("RESPA") challenging fees charged by FATIC. (Id. at ¶¶ 118-
24.)

1 This Court previously issued an order on a 12(b)(6) motion in this action, in which it
2 dismissed some of Plaintiffs' RESPA claims as untimely. Plaintiffs now seek to add Ms.
3 Alberg as a class representative in order to reinstate those claims. Plaintiffs also seek to
4 modify the complaint to conform it to the other portions of the 12(b)(6) order. Defendants
5 object only to the addition of Ms. Alberg as a class representative, and this order addresses
6 that issue. (Dkt. No. 95 at 4; Dkt. No. 97 at 5 n.1.)

7 The Court's deadline for joining additional parties was March 27, 2009, and the
8 deadline for filing amended pleadings was April 6, 2009. (Dkt. No. 77 ("Scheduling
9 Order").) The Court's ruling on Defendants' 12(b)(6) motion issued on March 23, 2009, and
10 Plaintiffs filed this motion to amend on April 23, 2009.

11 Discussion

12 A motion seeking to amend a complaint and join additional parties after the relevant
13 deadlines have passed implicates Rules 15 and 16 of the Federal Rules of Civil Procedure.
14 Rule 16 applies as a threshold analysis to all motions requesting modification of a court's
15 scheduling order. The Rule requires that a party show "good cause" for modifying the
16 deadlines set forth in a scheduling order. Fed. R. Civ. P. 16(b)(4).

17 A court reaches the Rule 15 analysis only after the party seeking leave to amend has
18 met the requirements of Rule 16. Yet Plaintiffs' motion focuses solely on Rule 15, without
19 addressing Rule 16 or requesting modification of the Scheduling Order. This failure alone is
20 grounds for denying the motion. Johnson v. Mammoth Recreations, 975 F.2d 604, 608 (9th
21 Cir. 1992) (citing U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099,
22 1104 (9th Cir. 1985)). Nevertheless, some precedent indicates that a court may treat an
23 untimely motion to amend as a de facto motion to modify the scheduling order. See R.L.
24 Clark Drilling Contractors, Inc. v. Schramm, Inc., 835 F.2d 1306, 1308 (10th Cir. 1987)
25 (treating a party's late assertion of a new issue as an implicit motion to amend the pretrial
order); but see Johnson, 975 F.2d at 608-09 (suggesting that the Ninth Circuit disfavors the

1 practice). The following analysis gives Plaintiffs the benefit of the doubt and discusses the
2 issue as though they had filed the proper motion.

3 A plaintiff satisfies the “good cause” standard by showing that, even acting diligently,
4 she could not have met the deadlines set forth in the scheduling order. Johnson, 975 F.2d at
5 609 (citing Fed. R. Civ. P. 16 advisory committee’s notes to the 1983 amendment). Plaintiffs
6 have not met this standard in their request to join Ms. Alberg as a named plaintiff.

7 The Court’s Scheduling Order allowed Plaintiffs to join parties until March 27, 2009.
8 Plaintiffs received the order dismissing their RESPA claims on March 23, 2009. Plaintiffs
9 assert that they could not have “reasonably predict[ed]” the Court’s dismissal of their RESPA
10 claims as untimely, and that they “diligently pursued amendment” upon receipt of the Court’s
11 order. (Dkt. No. 100 at 5.) Plaintiffs support their argument by claiming that this Court was
12 “the first in this District to reject the equitable estoppel and tolling arguments that Plaintiffs
13 advanced.” (Dkt. No. 100 at 3.)

14 Plaintiffs’ characterization of the case law is incorrect. Plaintiffs’ own authority,
15 Contos v. Wells Fargo Escrow Co., held equitable tolling applicable in circumstances where
16 the defendants made affirmative misrepresentations, but specifically distinguished precedent
17 rejecting similar equitable tolling arguments in cases lacking allegations of affirmative
18 misrepresentations. Case No. CV08-838TSZ (W.D. Wash. filed Oct. 1, 2008). Because
19 Plaintiffs “fail to allege that Defendants actively engaged in wrongful conduct that prevented
20 Plaintiffs from discovering the claims,” Contos is not applicable. (Dkt. No. 91 at 6.)
21 Plaintiffs also rely unavailingly on case law resulting from factually dissimilar RESPA
22 claims, see Blaylock v. First American Title Insurance Co., 504 F. Supp. 2d 1091, 1095
23 (W.D. Wash. 2007) (applying equitable tolling where the plaintiffs filed suit two days after
24 the defendants’ allegedly illicit conduct became publicly known), and case law that does not
25 directly support their argument, see Bushbeck v. Chicago Title Insurance Co., Case No. C08-
755JLR (W.D. Wash. filed Dec. 4, 2008) (upholding RESPA claims without addressing any

1 statute of limitations issue); Hanka v. Chicago Title Insurance Co., Case No. C08-984JLR
2 (W.D. Wash. filed Feb. 10, 2008) (sustaining equitable tolling argument on highly fact-
3 specific grounds).

4 Finally, Plaintiffs' argument that they could not have known how the Court would rule
5 on Defendants' challenge to the RESPA claims is disingenuous in light of an earlier ruling
6 issued by this Court on similar arguments. This Court issued an order on a 12(b)(6) motion in
7 Cornelius v. Fidelity National Title Co., whose plaintiffs have the same legal representation as
8 the current Plaintiffs, two weeks before ruling on the 12(b)(6) motion in this action. Case No.
9 C08-754MJP (W.D. Wash. filed March 9, 2009). The Cornelius order rejected an argument
10 for equitable estoppel and equitable tolling identical to that presented by Plaintiffs in this case.
11 Yet Plaintiffs admit that they waited to begin investigating an amended complaint until after
12 this Court issued its order on Defendants' 12(b)(6) motion, just four days before the deadline
13 for joining additional parties and two weeks before the deadline for amending pleadings, both
14 of which had been known to Plaintiffs since the Court issued its Scheduling Order. (Dkt. No.
15 95 at 3; Dkt. No. 100 at 5.)

16 In sum, Plaintiffs find no support in case law for their request to modify the
17 Scheduling Order, and Plaintiffs' failure to prepare for the possibility that Defendants might
18 prevail on their motion to dismiss indicates that they did not diligently seek to comply with
19 the Scheduling Order with respect to adding Ms. Alberg as a party. Defendants' motion to
20 dismiss, filed September 23, 2008, put Plaintiffs on notice that their RESPA claims might be
21 time-barred. Although this Court did not rule on that motion until March 23, 2009, shortly
22 before the deadlines for joining additional parties and amending the pleadings, that fact does
23 not absolve Plaintiffs of their responsibilities under Rule 16. Plaintiffs could have filed a
24 motion to extend the deadlines for joinder and amendment as soon as this Court ruled on the
25 12(b)(6) motion, but they failed to do so. Because they do not meet Rule 16(b)(4)'s required

1 showing of good cause to amend the Scheduling Order, the Court must deny Plaintiffs'
2 motion and need not address the parties' Rule 15 arguments.

3 **Conclusion**

4 Plaintiffs improperly failed to file a motion to amend the Scheduling Order, and they
5 additionally failed to act with sufficient diligence to establish good cause for amending the
6 order. The Court therefore DENIES Plaintiffs' motion.

7 The Clerk is directed to send a copy of this order to all counsel of record.

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9 DATED this 2nd day of July, 2009.

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11 /s/ Marsha J. Pechman
12 Marsha J. Pechman
13 United States District Judge
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